

LETTER OPINION
95-L-270

November 29, 1995

Mr. Bob Peterson
State Auditor
State Capitol
Bismarck, ND 58505

Dear Bob:

Thank you for your letter requesting my opinion on whether the transfers from the Bank of North Dakota (Bank) to the general fund provided for in section 12 of chapter 17 of the 1995 North Dakota Session Laws are discretionary. The answer to your request can be broken into two parts. First whether the transfer of money by the Industrial Commission is discretionary, and second whether the requests made by the Director of the Office of Management and Budget (Director) are discretionary as to the timing of transfers and the amounts of individual transfers. Section 12 of chapter 17 of the 1995 North Dakota Session Laws provides:

During the period of time beginning with the effective date of this Act and ending June 30, 1997, the industrial commission shall transfer to the state general fund up to \$31,900,000, an amount equivalent to the transfers not made but authorized by the fifty-third legislative assembly, and \$24,000,000 for the period beginning July 1, 1995, and ending June 30, 1997 from the earnings and accumulated and undivided profits of the Bank of North Dakota. The moneys shall be transferred in amounts and at such times as requested by the director of the office of management and budget.

If, by April 1, 1997, the director of the office of management and budget determines that a transfer is necessary for a July 1, 1997, general fund balance of \$10,000,000, an additional transfer of up to \$4,000,000 of earnings and accumulated and undivided profits at the request of the director of the office of management and budget shall be made to the general fund.

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No transfers may be made that would reduce the Bank's capital structure below \$76,000,000.

If the revised projection for the July 1, 1997, general fund balance estimated by the director of the office of management and budget in November of 1996 is \$30,000,000 or more, the Bank of North Dakota shall suspend such transfer to the general fund until the Bank's capital structure is \$100,000,000.

1995 N.D. Sess. Laws ch. 17, § 12. The questions you pose arise because the Bank wishes to set aside the funds necessary to provide for the transfers to be made by the Director. If neither of the parties has discretion, all of the funds must be set aside so that the Bank's capital is appropriately determined. If the parties have discretion, only that amount of the funds which the Director has determined needs to be transferred should be set aside from the Bank's capital. The action of setting aside the funds is significant to presenting an accurate picture of the condition of the Bank. Doing so will also mean neither the Bank nor the Industrial Commission will rely upon the funds which have been set aside to make decisions as to the Bank's day-to-day operations.

Section 12 of chapter 17 of the 1995 North Dakota Session Laws sets clear parameters for triggers for additional transfers and for reductions in the amounts transferred by the first paragraph. Thus, if the Director determines at any time by April 1, 1997, that the July 1, 1997, general fund balance will be less than \$10,000,000, "an additional transfer of up to \$4,000,000 . . . shall be made." 1995 N.D. Sess. Laws ch. 17, § 12. (Emphasis supplied.) Additionally, if in November 1996 the July 1, 1997, general fund balance is projected to be \$30,000,000 or more, the Bank "shall suspend" transfers until the "Bank's capital structure" reaches \$100,000,000. Id. Additionally, no transfers can be made from the Bank if the transfer reduces the "Bank's capital structure" below \$76,000,000. Id.

Likewise, the Industrial Commission's status as a ministerial functionary in this matter is also clear. The first paragraph of section 12 provides: "the industrial commission shall transfer to the state general fund. . . ." Id. The second paragraph of section 12 provides, based on the Director's determination, that an additional transfer of up to \$4,000,000 "shall be made." Id. This language does not grant the Industrial Commission any decision making authority. It is therefore my opinion that the Industrial Commission must make a transfer from the Bank to the general fund if the Director requests the transfer. The authority of the Bank to suspend transfers because the July 1, 1997, general fund balance projected in

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November 1996 will be \$30,000,000 or more is also free from ambiguity and means that the Bank must not transfer funds to the general fund if the July 1, 1997, general fund balance projected by the Director in November 1996 is at least \$30,000,000. Therefore, it is my opinion that section 12 of chapter 17 of the 1995 N.D. Session Laws (H.B. 1017) does not give the Industrial Commission discretion to determine whether a transfer should be made.

The remaining issue, whether the Director has discretionary authority as to the amount and timing of the requests for transfers of the "earnings and accumulated and undivided profits of the Bank of North Dakota" provided for in section 12 of chapter 17 of the 1995 North Dakota Session Laws, is also easily resolved. No transfer dates are set in the language of the enactment. No specific amounts are set in the language of the enactment. Yet at some point between the effective date of the enactment, July 1, 1995, and the last day of the biennium, June 30, 1997, the Director is to make a request or requests to the Industrial Commission for money to be transferred into the general fund. Because the dates and amounts have not been spelled out in the language of section 12, the Director must exercise his discretion to determine appropriate dates and amounts of transfers.

The Legislature may delegate authority to the executive branch to exercise discretion if the authority delegated is "not exclusively legislative and [is something] which the Legislature cannot conveniently do because of the detailed nature." County of Stutsman v. State Historical Soc'y of North Dakota, 371 N.W.2d 321, 327 (N.D. 1985). "The true distinction between the powers which the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted by the Legislative Assembly." Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 411 (N.D. 1971). Thus "[t]he power to ascertain certain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers." County of Stutsman, at 327. The Legislature may delegate in broad, general terms if there are "adequate procedural safeguards and adequate standards." Lawrence v. Lawrence, 432 N.W.2d 897, 898 (N.D. 1988). See also Trinity Medical Ctr. v. N.D. Bd. of Nursing, 399 N.W.2d 835 (N.D. 1987) (Finding broad authority to set nursing education standards an appropriate delegation.).

The day-to-day operation of state government's finances is a matter which is appropriately left to the discretion of the executive branch. Once an appropriation has been made its implementation is the

responsibility of the executive branch. The provision in question was enacted to assure that the state general fund had sufficient moneys to assure a balanced budget and to assure that the Bank was able to retain its earnings as long as possible. Hearing on H. 1017 Before the Government Operations Subcommittee of the House Committee on Appropriations, 54th N.D. Leg. (February 13, 1995) (Statements of Paul Kramer, Legislative Council, and Rep. Clayburgh). Hearing on H. 1017 Before the House Committee on Appropriations, 54th N.D. Leg. (February 14, 1995) (Statements of Reps. Dalrymple, Clayburgh, Tollefson, and Kaldor). To assure these goals were accomplished the Legislature provided some express guidelines for the Director by setting upper and lower limits and some time "triggers" for determining those limits. The Legislature also expressed itself as follows:

- The maximum amount the Director can transfer is stated in section 12. The Legislature limited the Director's discretion as to the total amount which can be transferred.
- The Bank must suspend transfers if the Director's estimate of the July 1, 1997, projected general fund balance is \$30,000,000 or greater in November 1996.
- The Director is limited as to the source of the transfers requested to "the earnings and accumulated and undivided profits of the Bank." Thus, if the "earnings and accumulated and undivided profits of the Bank" are not sufficient, the Director is not authorized to make a request and the Industrial Commission is not required to make a transfer of funds from the Bank to the general fund.
- No transfers can be made which would reduce the Bank's capital structure below \$76,000,000.
- The Legislature also discussed the Director's authority during its deliberations. Individual legislators expressed their understanding that the Director was to consider the condition of the Bank and to delay transfers as long as possible so that the capital of the Bank would increase. Hearing on H. 1017 Before the Government Operations Subcommittee of the House Committee on Appropriations, 54th N.D. Leg. (February 13, 1995) (Statements of Paul Kramer, Legislative Council, and Rep. Clayburgh). Hearing on H. 1017 Before the House Committee on Appropriations, 54th N.D. Leg. (February 14, 1995) (Statements of Reps. Dalrymple, Clayburgh, Tollefson, and Kaldor). This would allow the Bank to

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generate greater returns increasing the potential that more funds would be available to respond to future needs.

- The Director's discretion is limited by the language of N.D.C.C. § 54-44.1-12 which permits the Director to make an allotment that reduces the amount of funds that can be disbursed pursuant to an appropriation only under four situations. The relevant situation here is when "[t]he moneys and estimated revenues in a specific fund from which the appropriation is made are insufficient to meet all legislative appropriations from the fund." N.D.C.C. § 54-44.1-12(1). This language, and the fact that the Legislature included all of the transfers authorized by section 12 as income to the general fund, would require the Director to request a transfer from the Bank if the moneys in the general fund appeared to be insufficient to meet the appropriations made from it by the Legislature.

Each of these parameters demonstrate that the Legislature did not give the Director unfettered discretion. The requirement that transfers be suspended if the July 1, 1997, general fund balance is projected to be \$30,000,000 or more in November 1996, is consistent with legislators' statements that if general fund incomes from elsewhere exceeded expectations, transfers from the Bank would be suspended until the Bank's capital structure "was back up to \$100,000,000." Likewise, if the general fund balance did not meet expectations, \$4,000,000 more in funds could be required from the Bank. Legislative enactments are presumed to be constitutional. N.D. Council of Sch. Admr's v. Sinner, 458 N.W.2d 280, 285 (N.D. 1990). Therefore it is my opinion that the Director has discretion to determine the amounts and timing of transfers from the Bank to the general fund. It is my further opinion that the Director's exercise of discretion must take into account the condition of the general fund as well as the condition of the Bank when determining whether a transfer should occur. In doing so, the Director should delay the request for a transfer as long as possible. However, the Director should not delay making a transfer for so long that the funds are necessary to avoid the allotment provisions of N.D.C.C. § 54-44.1-12(1).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Ron Tolstad
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